

*STATE OF FLORIDA
 DIVISION OF ADMINISTRATIVE HEARINGS
 OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
 ORLANDO DISTRICT OFFICE*

Luis Antonio Rivera,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 12-025169WJC
)	
F.C.S. Building Services, LLC,)	Accident date: 09/03/2012
)	
Employer,)	Judge: W. James Condry, II
)	
and)	
)	
CastlePoint Florida Insurance Company,)	
)	
Carrier.)	
)	

ORDER ON MOTION TO TAX COSTS

THIS CAUSE came before the undersigned on the afternoon of Wednesday, November 6, 2013, on the employer/carrier’s, hereinafter referred to as the E/C’s Motion to Tax Costs as the prevailing party against the claimant. The authority for the subject proceeding derives from *Section 440.34(3), Florida Statutes (2012)*. Presenting at the evidentiary hearing were attorneys Gina M. Jacobs for the E/C and attorney Monte Shoemaker for the claimant. Also appearing at the hearing was the claimant, Luis Antonio Rivera, and employer representatives Kirk Wong and Raphael Garcon

By way of background the claimant’s petitions for benefits filed on November 1, 2012 and November 15, 2012 were dismissed by this court in an order entered on April 10, 2013 due to the claimant’s failure to attend properly noticed events and to prosecute his claim. Although

the petitions were dismissed without prejudice, I nevertheless find that the E/C at least to this point has established itself as the prevailing party as to the benefits claimed on those dismissed petitions. This ruling does not preclude the claimant from filing new petitions and if successful claiming prevailing party costs and fees against the E/C.

Even had a petition been pending at the time of trial I would nevertheless reject the claimant's argument that litigation of the prevailing party issue would be premature. As previously stated the petitions were dismissed and the plain reading of Section 440.34(3) (b) suggest the award of prevailing party costs is mandatory. However I find claimant's rights are protected to the extent that should he prevail on the subsequently filed petition or petitions he would be in a position to claim and pursue prevailing party costs.

The fact that the petitions for benefits were dismissed without prejudice is irrelevant to the prevailing party determination. See *Palm Beach County School District v. Ferrer, 990 So.2d 13 (Fla. 1st DCA 2008)*. Furthermore I find no contrary handling in this matter is reasonably justifiable because the dismissals were by virtue of court order as opposed to voluntary withdrawal. In fact I find it more compelling that with the dismissal of the petitions by the judge due to the claimant's failure to comply with properly noticed events and court instructions that the E/C be deemed the prevailing party having the litigation initiated by the claimant terminated.

The E/C filed a motion to tax cost with verified affidavit on June 3, 2013. At such time the claimant was unrepresented. Attorney Shoemaker filed a notice of appearance on October 10, 2013. No written response to the Motion to Tax Cost had been filed as of the time of trial. The following exhibits were considered in the resolution of the E/C's cost claim:

Exhibits:

1. The Order Dismissing All Claims and Pending Petitions for Benefits entered on 04/10/13 marked as exhibit #1.
2. The Motion to Tax Cost and attachments marked as exhibit #2.

Section 440.34(3) provides that, "If any party should prevail in any proceedings before a judge of compensation claims or court, there shall be taxed against the nonprevailing party the reasonable costs of such proceedings, not to include attorney's fees."

Florida Administrative Code Rule 60Q-6.124(3) (a) 6 provides that a motion for disputed costs shall include a detailed list of all *taxable* costs advanced or incurred. *Rule 60Q-6.124(3) (b)* provides that within 30 days after the motion is served, the opposing party or parties shall file a response to the motion, which includes a detailed recitation of all matters which are disputed... Failure to file a timely and specific response detailing matters which are disputed shall, absent good cause, result in acceptance of the allegations in the motion as true.

Florida Administrative Code Rule 60Q-6.124 (3) (e) provides that the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions shall be considered by the judge in determining the reasonableness of an award of cost reimbursement.

The burden of proof is on the moving party, in this instance the E/C, to show that all requested costs were reasonably necessary to defend the case at the time the action precipitating the cost was taken. In considering the evidence produced, the arguments of counsel and being otherwise advised in the premises, I make the following findings:

- That the E/C is considered the prevailing party in this case and is entitled to costs due to the dismissal of the claims for which litigation was initiated by claimant (see Order Dismissing All Claims & Pending Petition for Benefits dated April 10, 2013).
- That the claimant did not present or otherwise establish sufficiently good cause to excuse his failure to fulfill the timing and detail requirements of *Rule 60Q-6.134(3) (b)*. There was no written response to the motion to tax costs filed even following the appearance of new counsel on claimant's behalf.
- That although I am constrained to accept the E/C's representations as true that it incurred the costs as represented in its verified affidavit, I nevertheless find that the judge is required to determine whether the cost incurred are actual recoverable costs.
- I find that the E/C is entitled to the full amount of costs requested for the following reasons.

- That the E/C's cost of \$926.31 for the taking of the claimant's deposition on 12/10/12 is recoverable under the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions **Rule I.A.**
- That the E/C's costs totaling \$121.12 for securing the copies of records in discovery from Jewett Orthopaedic, Oviedo Podiatry, Walgreens Pharmacy and HealthPort is recoverable under the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions Rule I.B.2.

In summary I find it is critical that the judge award such costs as reasonably incurred for the successful prosecution of the claim and no other. I have determined the recoverable costs considering the Uniform Statewide Guides as directed by procedural rule. I have also considered the evaluation of cost as outlined in the case of *Marton v. Florida Hospital Ormond Beach/Adventist Health Systems*, 98 So.3d 754 (Fla. 1st DCA 2012). In having done so I find that in response to the E/C request for the reimbursement of \$1,047.43 in costs, the E/C is entitled to the payment of its reasonable cost as the prevailing party on this claim in the amount of **\$1,047.43**.

WHEREFORE IT IS ORDERED AND ADJUDGED that:

- (1) The Motion to Tax Costs against the claimant is GRANTED.
- (2) The claimant shall pay the E/C on behalf of it and the employer **\$1,047.43** which I find to be reasonable.

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida.

W. James Condry, II
Judge of Compensation Claims
Office of the Judges of Compensation Claims
400 West Robinson Street, Suite 608-North
Orlando, Florida 32801-1701

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Judge of Compensation Claims entered the foregoing order. A true and accurate copy of the order has been furnished by e-mail to the parties' attorneys of record on this the 6th day of November 2013. The attorneys are directed to provide a copy of the order to their respective clients.

Assistant to Judge of Compensation Claims

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